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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL PUBLIC UTILITIES CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, METROPOLITAN EDISON COMPANY and PENNSYLVANIA ELECTRIC COMPANY,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, under the discretionary function exception to the Federal Tort Claims Act, the United States is insulated from liability for the negligent failure of government agency officials to warn petitioners, the owners of the Three Mile Island nuclear electric generating facility, of serious safety hazards of which the agency was aware as a result of its investigation of an event at another utility's nuclear facility as well as other information it had obtained.

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is unreported. (1a-17a.)[1] The opinion of the United States District Court for the Eastern District of Pennsylvania denying respondent's motion to dismiss is reported at 551 F. Supp. 521. (18a-35a.)

1 References are as follows: "J.A." refers to the Joint Appendix filed in the court of appeals which includes the complete text of petitioners' Amended Complaint in this action; "__a" refers to the Appendix herein which contains, among other things, pertinent excerpts from petitioners' Amended Complaint.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 28, 1984 (36a), and this petition is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, which provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674.
>
> * * *
>
> "The provisions of this chapter . . . shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

2. Portions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801, *et seq.* (37a-38a.)

STATEMENT OF THE CASE

This action arises from the March 28, 1979 accident at petitioners' nuclear electric generating facility known as Three

Mile Island Unit No. 2 ("TMI").[2] The complaint alleges that negligent acts and omissions of employees of the Nuclear Regulatory Commission ("NRC" or the "Commission") contributed to the catastrophic damage suffered by petitioners as a result of the accident.

No answer to the complaint has been filed, and no discovery has been conducted. Accordingly, the only facts before the district court and the court of appeals were those contained in the complaint. Those facts must be accepted as true and must be construed liberally in petitioners' favor. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

As alleged in the complaint, the NRC has undertaken, pursuant to statutes and regulations as well as long-standing practice, to operate a central warning system for the protection of operators of nuclear plants as well as the public. (40a-41a; J.A. 71-73.)[3] Because it would be unrealistic for each operator

2 Plaintiff Metropolitan Company ("Met-Ed") owns an undivided 50% interest in TMI, which it operated under license from the NRC prior to the accident. Jersey Central Power & Light Company ("JCP&L") and Pennsylvania Electric Company ("Penelec") each own an undivided 25% interest in TMI. General Public Utilities (GPU) is an investor-owned public utility holding company which owns all the common stock of JCP&L, Met-Ed and Penelec and coordinates their operations to function as a single, integrated electric utility system known as the GPU system. Disclosure statements, dated January 13, 1983, which are similar to that required by Rule 28.1 of the Supreme Court Rules, as amended, were supplied to the Third Circuit pursuant to Local Rule 25.

3 Section 208 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5848, requires the NRC to disseminate information on any "abnormal occurrence," including its causes and action to prevent reoccurrence, as soon as the information becomes available to it. (38a.) Similarly, the Commission's regulations impose a duty on the NRC to administer programs for "notifying licensees regarding generic problems so as to achieve appropriate precautionary or corrective action." 10 C.F.R. 1.64 (1977). (41a; J.A. 72.) The NRC is also required by statute to obtain reports from licensees and suppliers, which it analyzes and uses in its warning system regarding nuclear safety hazards and defects. Section 206, Energy Reorganization Act of 1974, 42 U.S.C. § 5846. (37a-38a.)

of a nuclear facility to monitor operating experience throughout the industry, the NRC serves as a clearinghouse, gathering information about generic safety hazards and rapidly disseminating it to plant operators. (45a-46a; J.A. 91-93.) As the NRC has stated, "when an inspection or investigation discloses events or conditions that present a potential or actual threat to public health and safety," the NRC "routinely communicates what it has found" to all licensees of nuclear plants. U.S. Nuclear Regulatory Commission Annual Report 1978. (J.A. 74.) Prior to the TMI accident, the NRC's warning system was relied upon by all nuclear plant operators, and was crucial to the existence of the nuclear power industry. Following the TMI accident, and as a result of shortcomings in the NRC's operation of its warning system disclosed by the accident, the nuclear industry created a private organization to fulfill this crucial function and supplement the NRC's warning system. (46a; J.A. 93.)

In a report entitled "Three Mile Island—A Report to the Commissioners and to the Public," the NRC admitted that eighteen months before the TMI accident, an accident occurred at the Davis-Besse nuclear plant in Ohio which was "almost an exact copy of the accident that subsequently occurred at TMI." (39a; J.A. 70.) The Davis-Besse and TMI reactors were both pressurized water reactors manufactured by the Babcock & Wilcox Company ("B & W"). The NRC promptly investigated the Davis-Besse event and identified the pertinent safety hazards. (41a-42a; J.A. 80-81.) The NRC was aware that the safety hazards discovered at Davis-Besse existed at other nuclear facilities, because it knew that "similar pieces of equipment with comparable probabilities of similar failure modes were installed on other B&W plants." (40a; J.A. 70.) Yet the NRC failed to warn the petitioners or other plant operators of the hazards it had discovered. (*Id.*) As alleged in the complaint, if the NRC had warned petitioners of the known safety hazards revealed by the Davis-Besse event and certain other precursors, the TMI accident would not have occurred. (40a; J.A. 71.)

Both the Davis-Besse and TMI accidents involved a stuck-open valve at the top of the "pressurizer" which resulted in a loss of water essential to cooling the reactor's nuclear core. The NRC learned from the Davis-Besse accident that the emergency procedures in effect at B & W-designed nuclear plants directed plant operators to monitor the water level in the system using an indicator, i.e., water level in the pressurizer, which proved to be inaccurate and misleading under certain circumstances. In a January 1978 internal memorandum, NRC employees noted that the operators at Davis-Besse had been misled by this inaccurate indicator into thinking that there was sufficient water in the reactor coolant system and had shut off the flow of replacement water. (43a; J.A. 86-87.) The NRC employees expressed concern that since "operators would control makeup flow based on the pressurizer level as part of their normal procedures," operators of B & W-designed plants "could erroneously shut off makeup flow" even where the system was actually experiencing a critical water shortage. (*Id.*) Nevertheless, the NRC failed to transmit this essential safety information to the owners of B & W-designed nuclear plants. (44a; J.A. 88.)

As a result, on March 28, 1979 petitioners were misled as to the true water level in the TMI reactor coolant system. Like the operators at Davis-Besse before them, the TMI control room operators reduced the flow of vital replacement water even as the nuclear core was uncovering, overheating and beginning to melt. Had the NRC warned petitioners not to rely on the misleading indicator, the TMI accident would not have occurred. (40a; J.A. 71.)

Petitioners brought this action in the United States District Court for the Eastern District of Pennsylvania which had jurisdiction pursuant to 28 U.S.C. § 1346(b).[4] The district

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4 Petitioners are seeking review only with respect to their first cause of action, based on the failure to warn described in text, and not their

court denied a motion to dismiss brought by respondent, holding that (1) the petitioners had stated a claim upon which relief could be granted and (2) that claim was not barred by the discretionary function exception or the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), (h). Recognizing the significance of the litigation involved, the district court certified the following question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b):

> "Is our decision correct that neither the misrepresentation nor the discretionary function exception [to the Federal Tort Claims Act] bars this suit?" (35a.)

The case was argued before the Third Circuit on September 13, 1983. However, in a letter dated October 25, 1983, the Third Circuit advised the parties that it would await this Court's decision in *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* Nos. 82-1349, 82-1350 (hereinafter cited as *Varig*), which was then *sub judice*, before rendering a decision. After *Varig* was decided, 104 S.Ct. 2755 (1984), the Third Circuit, relying entirely on *Varig,* held that the government's failure to warn of known, serious safety hazards was protected by the discretionary function exception. Although the government's negligent failure to warn in this case involved no social, political or economic policy or regulatory decisions, the court of appeals held that the government was immune from liability because the NRC's categorization of an event as an abnormal occurrence requiring congressional notification might, under certain circumstances, entail "considerations of public health and safety", as well as "technical and scientific evaluations", and because the NRC was acting here "in its role as regulator. . . ." (13a.) As we demonstrate below, the Third Circuit's decision conflicts with applicable decisions of this Court and other courts of appeals.

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second cause of action, which relates to the NRC's undertaking to review and approve safety analyses prepared by nuclear reactor manufacturers.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. The Courts Have Repeatedly Upheld FTCA Claims, Such As Petitioners', Which Involve A Negligent Failure To Warn Of Safety Hazards

Stripped of the industry jargon and scientific detail, petitioners' claim is simply that the NRC, having undertaken to warn nuclear plant operators, such as petitioners, of safety hazards, identified a serious safety hazard and failed to warn petitioners. (39a-40a; J.A. 69-70.) The complaint alleges that if a warning had been communicated, the TMI accident would never have occurred. (40a; J.A.71.) Claims such as this, based on a negligent failure to warn of safety hazards, have repeatedly been upheld under the Federal Tort Claims Act by this Court and the courts of appeals. *E.g., Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955) (negligent failure to warn of shipping hazard); *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir.), *cert. denied,* 389 U.S. 931 (1967) (negligent failure to warn of air traffic hazards); *United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir.), *cert. dismissed.,* 379 U.S. 951 (1964); *Eastern Air Lines, Inc.* v. *Union Trust Co.,* 221 F.2d 62 (D.C. Cir.), *aff'd per curiam sub nom. United States* v. *Union Trust Co.,* 350 U.S. 907 (1955) (same).

As this Court held under the FTCA in *Indian Towing:*

> "It is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." 350 U.S. at 64-65.

Thus, the Third Circuit's decision here, holding that petitioners' failure to warn claim is barred by the discretionary function exception to the FTCA, represents a significant departure from the prior decisions of this Court and other courts

of appeals in failure to warn cases. Furthermore, this Court's opinon in *Varig*, on which the Third Circuit relied almost entirely, was not a failure to warn case and did not define the discretionary function exception to include a negligent failure to warn of known safety hazards. Indeed, as demonstrated below, it is clear from *Varig* that petitioners' claim is not covered by the discretionary function exception.

B. The Government's Negligent Failure To Warn Petitioners Of Known Safety Hazards Involved No Social, Economic Or Political Policy Judgments And, Under This Court's Recent Decision In *Varig*, Is Not Protected By The Discretionary Function Exception

In *Varig*, 104 S. Ct. 2755 (1984), this Court reaffirmed that the rationale for the discretionary function exception to the Federal Tort Claims Act was that

> "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Id.* at 2765.

Accord, *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953); *Estate of Callas* v. *United States*, 682 F.2d 613, 619-20 (7th Cir. 1982); *Hitchcock* v. *United States*, 665 F.2d 354, 363-64 (D.C. Cir. 1981).

The claims in *Varig* which, unlike the present case, were resolved after trial or on summary judgment rather than on a motion to dismiss the complaint on its face, arose from allegedly negligent certifications, by the Federal Aviation Administration and its predecessor, of aircraft which did not comply with FAA safety regulations. The aircraft had been inspected pursuant to a "spot-check" program designed by the FAA "to encourage manufacturers and operators to comply fully with minimum safety requirements." *Id.* at 2766. The Court found no indication in the record, however, that in the course of the "spot-check" program the defective component "was actually inspected or reviewed by an FAA inspector." *Id.* Under these circumstances, the Court held that the FAA's determination to utilize a "spot-check" system to monitor the

manufacturers' regulatory compliance was protected by the discretionary function exception. Thus, the Court stated:

> "The FAA's implementation of a *mechanism for compliance review* is plainly discretionary activity of the 'nature and quality' protected by § 2680(a). . . . Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the *FAA has determined that a program of 'spot-checking' manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. . . . It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent." Id.* at 2768 (emphasis added).

In addition, the Court stated: "It follows that the acts of FAA employees in executing the 'spot-check' program *in accordance with agency directives* are protected by the discretionary function exception." *Id.* (emphasis added).[5]

The case at bar, however, is totally unlike *Varig,* for it involves no high-level planning decision involving "social, economic and political" judgments and no acts or omissions of

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5 This analysis of the discretionary function exception is consistent with this Court's analysis more than thiry years ago in Dalehite v. United States, 346 U.S. 15 (1953). In *Dalehite* the Court held that the discretionary function exception protected not only discretionary policy decisions "made by executives or administrators in establishing plans, specifications or schedules of operations," *id.* at 35-36, but also the "acts or omissions of government employees, *exercising due care* in carrying out statutes or regulations whether valid or not." *Id.* at 33 (emphasis added). The Court held, however, that the "tortious conduct of [government] agents acting within their scope of business" is not protected. *Id.* at 27-28.

government employees properly carrying out government programs "in accordance with agency directives." Rather, the complaint alleges that government employees negligently failed to warn petitioners of known safety hazards—a clear example of operational negligence which has long been held to be outside the discretionary function exception. Indeed, the courts, including this Court, have consistently upheld the validity of claims under the FTCA alleging such operational neglience. *E.g., Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955); *Estate of Callas* v. *United States,* 682 F.2d 613, 624 (7th Cir. 1982) (once "policy decision to erect warning signs has . . . been made . . . the government has no discretion to carry out its policies negligently"); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (policy decision to establish air traffic control system was exercise of discretion at planning level; failure to report weather changes as necessary is not discretionary function); *United Air Lines, Inc.* v. *Wiener,* 335 F.2d, 397 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (finding it was "negligence at the operational level of the government to fail to inform United of the details of the government's hazardous activity"); *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62, 77 (D.C. Cir.), *aff'd per curiam sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907 (1955) ("discretion was excerised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently"). *See, Dalehite* v. *United States*, 346 U.S. 15 (1953) (establishing the distinction between negligence at the planning level and operational negligence).

As described above, this case involves a program established by the NRC for collecting information regarding operating experience at nuclear plants industrywide, analyzing that information and warning nuclear plant owners of defects and hazardous conditions. Clearly, the NRC's decisions as to the content of this warning system, such as staffing and funding, involved "social, economic and political" judgments which are protected by the discretionary function exception. Moreover, as this Court held in *Varig,* the actions of NRC employees following the directives of their superiors in performing the

specifics of the NRC's undertaking are likewise protected by the discretionary function exception.

In *Varig,* however, it was the FAA's initial decision to establish only a "spot-check" program and the implementation by FAA officials of that decision, rather than the carelessness of FAA employees in carrying out the program, that was challenged by the plaintiffs. Here, it is neither the NRC's decision as to the scope of its undertaking nor the actions of NRC employees in carrying out that undertaking "in accordance with agency directives" which petitioners claim was negligent. Petitioners' claim is that NRC employees were negligent in failing to provide a warning of known safety hazards as required by the NRC's own undertaking. In fact, the complaint alleges that if the warning system was carried out as established by the NRC the Three Mile Island accident would never have happened. (40a; J.A. 71.) Thus, under *Varig,* the discretionary function exception does not apply to the facts alleged in the complaint.

No social, economic or political judgments, or actions in furtherance of such judgments, are at issue here. Pursuant to the NRC's undertaking, NRC employees gathered information regarding operating experience at the Davis-Besse plant and other information and identified a serious safety hazard. (41a-44a; J.A. 80-81; 86-88.) Due to simple negligence, however, a warning regarding the hazard was not disseminated as it should have been under the NRC program. Under the facts alleged in the complaint, this failure to warn involved no balancing of competing social interests which would implicate the discretionary function exception, for there was no conceivable reason for not issuing a warning. In fact, it appears from the allegations of the complaint that the NRC never even made a decision as to whether or not to issue such a warning; once identified, the safety hazard was negligently forgotten until after the TMI accident.

It is precisely the distinction between, on the one hand, policy determinations and acts in accordance with such determinations and, on the other hand, simple operational negligence, that the Third Circuit ignored in holding that

petitioners' claim is barred by the discretionary function exception. In applying the rationale of *Varig* to the entirely dissimilar facts of this case, the Third Circuit erroneously read *Varig* as protecting operational conduct by government employees, regardless of whether such conduct actually involved the exercise of policy judgment or discretion. Thus, the Third Circuit's erroneous application of *Varig* would eliminate a major aspect of FTCA liability, contrary to what this Court and Congress intended.

At the very least, the Third Circuit's erroneous reading of *Varig* would eliminate the entire area of FTCA claims involving inspections actually made by the government. Surely, this was not the Court's intention in deciding *Varig*. Indeed, just last year the Court upheld the validity of a negligent inspection claim brought under the FTCA against the Farmers Home Administration, holding that the claim was not barred by 28 U.S.C. § 2680(h), the misrepresentation exception to the FTCA. *Block* v. *Neal,* 460 U.S. 289 (1983).

Recently, in *Andrulonis* v. *United States,* No. 79-CV-847 (N.D.N.Y. October 3, 1984) (available on LEXIS, Genfed library, Dist file), the court cited this same distinction, between acts in furtherance of a policy determination and simple operational negligence, in holding that *Varig* did not bar an FTCA claim for negligence in the development of a rabies vaccine. The court said:

> "It is significant to note that the plaintiffs in *Varig* did not allege specific acts of negligence on the part of FAA employees in the actual inspection of the defective planes. Instead, the plaintiffs were challenging the effectiveness of the FAA's spot-checking system in insuring compliance with safety regulations. The Court held that a challenge to the method selected by the FAA in the exercise of its regulatory authority implicated policy decisions; these policy decisions and their implementation were the type of exercise of discretionary authority that Congress intended to immunize from tort liability under the discretionary function exception, 28 U.S.C. § 2680(a)."

Here, as in *Andrulonis* and unlike in *Varig,* the complaint does not challenge "policy decisions" or "their implementation," but rather "specific acts of negligence" by government employees in carrying out their responsibilities under the NRC's warning program.

In sum, a proper reading of this Court's decision in *Varig* requires that the Third Circuit's decision be reversed and petitioners be permitted to pursue their claims against the government.

C. The Third Circuit Erroneously Concluded Based On *Varig* That Petitioners' Claim Is Barred By The Discretionary Function Exception Because The Claim Challenges Regulatory Activities

In *Varig,* this Court held that the discretionary function exception to the FTCA "was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." 104 S. Ct. at 2765. Purporting to follow this principle, the Third Circuit held that petitioners' claim is barred by the discretionary function exception since the NRC was "unquestionably acting in its role as regulator of the conduct of private individuals." (13a.)

Again, the Third Circuit seems to have misunderstood this Court's holding in *Varig* and the nature of the wrong alleged in the complaint. First, as the language quoted above from *Varig* makes clear, only the "discretionary acts" of the government are protected, even when it is acting in a regulatory capacity. Since the failure to warn alleged in the complaint did not entail any "discretionary acts," defined by this Court as involving or carrying out determinations of policy, the discretionary function exception does not apply.

Moreover, the wrong alleged in this action was not performed by the NRC "acting in its role as a regulator of the conduct of private officials," as that phrase was used in *Varig* by this Court. In *Varig,* the FAA was charged with negligently certifying that the design of certain aircraft complied with FAA

safety regulations. 104 S. Ct. at 2758. However, in the present case, the NRC is not charged with negligence in certifying regulatory compliance. Rather, the complaint alleges that the NRC undertook the non-regulatory function of monitoring nuclear experience industrywide and warning the owners and operators of nuclear plants of hazards discovered at other plants. (40a; J.A. 71.) Indeed, the investigation and warning function is so plainly non-regulatory that the nuclear generating industry has since formed a private organization to perform it. (46a; J.A. 93.) The NRC was not "regulating" the plants receiving such warnings, but rather providing them with essential safety information based on events discovered at other plants throughout the country, pursuant to its congressional mandate to perform that function.

The Third Circuit's misunderstanding of the complaint (from which all inferences were required to be drawn in petitioners' favor on the motion to dismiss) is further demonstrated by its description of petitioners' first cause of action as challenging the NRC's failure "to characterize the Davis-Besse event as 'an abnormal occurrence'—which the statute required it to report—or a 'generic problem'—for which the regulations specified notification." (11a.) In fact, nowhere in the complaint do petitioners allege any failure by the NRC to properly "characterize" the Davis-Besse event. Rather, the complaint alleges a failure by the NRC to warn of serious safety hazards which NRC employees actually uncovered in the course of their investigation of Davis-Besse and otherwise. (41a-42a, 43a-44a; J.A. 80-81, 86-88.)

Moreover, the Third Circuit totally ignores the fact that the complaint is based not merely on the NRC's statutory duties but also on its undertaking in fact to operate an industrywide warning system and to provide the owners and operators of nuclear plants with warnings of serious safety hazards uncovered at other plants throughout the country. (45a; J.A. 91-92.) This Court has consistently held that such an undertaking, independent of statutory duties, gives rise to a common law, non-regulatory duty on the part of the government to exercise

due care, violation of which is subject to Federal Tort Claims Act liability. *See, e.g., Indian Towing Co.* v. *United States,* 350 U.S. 61, 69 (1955).

In contrast to the FAA's function in *Varig*, the NRC was performing neither a discretionary nor a regulatory role in this instance. Thus, the Third Circuit's decision barring petitioners' claims based on the discretionary function exception conflicts with the applicable decisions of this Court and other courts of appeals and should be reversed.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed summarily on the authority of *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S. Ct. 2755 (1984), and *Dalehite* v. *United States*, 346 U.S. 15 (1953).

Dated: November 13, 1984

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1017

GENERAL PUBLIC UTILITIES CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY,

Appellees

v.

UNITED STATES OF AMERICA,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 81-4950)

Argued September 13, 1983

Before:
WEIS, HIGGINBOTHAM, and SLOVITER, *Circuit Judges.*

Opinion Filed September 28, 1984

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

Alleging that the Nuclear Regulatory Commission failed to warn them of equipment defects, the owners of the Three Mile Island nuclear facility seek substantial damages attributed to a valve failure at the plant. We conclude that the claims against the government are barred by the discretionary function exception of the Federal Tort Claims Act.

The plaintiffs' complaint asserts a right to recover under the Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, because the Commission did not comply with statutory directives or its own regulations. The government moved to dismiss, asserting the discretionary function and misrepresentation exceptions to the Act, *id.* §§ 2680(a), (h). The district court denied the motion but *sua sponte* certified its order as one involving a controlling issue of law under 28 U.S.C. § 1292(b). We accepted the appeal.

Plaintiffs own and operate the Three Mile Island Unit No. 2 nuclear facility in Londonderry Township, Pennsylvania.[1] Their complaint seeks more than four billion dollars in damages.

On March 28, 1979, a pilot-operated valve at Unit No. 2 failed to close properly, causing the reactor's coolant system to lose significant quantities of water and steam. The instruments that should have indicated that the valve remained open incorrectly showed it as being closed. A series of procedures undertaken in the belief that the valve was closed deprived the reactor of proper coolant, and it began to overheat. The nuclear core and protective claddings were severely damaged, resulting in the staggering financial losses to plaintiffs.

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1 Plaintiffs Metropolitan Edison Company, Jersey Central Power & Light, and Pennsylvania Electric Company all sell electrical energy to retail customers and other electrical companies. Each owns an interest in Three Mile Island Unit No. 2. Plaintiff General Public Utilities Corporation is a holding company owning all of the common stock of the electric companies. In March 1979, Metropolitan Edison was the operator of Three Mile Island Unit No. 2.

The complaint is in two counts. The first alleges that the Nuclear Regulatory Commission failed to exercise due care to discover, analyze, and warn of safety hazards. In particular, Count I alleges that in September 1977, 18 months before the Three Mile Island incident, a similar event occurred at the Davis-Besse nuclear power plant in Ohio. That facility was operated by the Toledo Edison Company and had been designed by the Babcock & Wilcox Company, which also prepared the plans for Three Mile Island.[2] Plaintiffs contend that the Commission failed to properly forward information to them about the cause of the Davis-Besse failure as well as the corrective measures developed to prevent similar occurrences.

The second count complains that the Commission negligently approved the Three Mile Island design and construction plans at a time when it knew or should have known that the pilot-operated relief valve could stick and cause a loss-of-coolant accident. Plaintiffs allege that the agency failed to require the manufacturer, Babcock & Wilcox, to analyze small breaks in a coolant system such as the one that was caused by the faulty valve at Three Mile Island.

In ruling on the government's motion to dismiss, the district court reviewed the Commission's statutory authority and the methods it uses to collect and disseminate safety information. Owners and operators are required to notify the Commission of defects in a facility that would create a substantial safety hazard, and the Commission is obligated to submit reports to Congress listing "abnormal occurrences." This information is also to be given wide dissemination to the public.

In carrying out its responsibility, the Commission has developed a series of mechanisms for the exchange of information with licensees. When the most serious events occur, a Bulletin is issued. It requires a response and may direct licensees to take specific action on a one time basis. For lesser degrees of danger, the Commission distributes a Circular, which does not

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2 Plaintiffs have also filed a suit against Babcock & Wilcox, alleging that it knew of the Davis-Besse incident but nevertheless completed Three Mile Island Unit No. 2 with a defective valve.

mandate action or necessitate a reply. Other information worthy of general distribution is provided in Licensee Event Reports. NRC Inspection and Enforcement Manual, Chap. 1125 (1977).

A Licensee Event Report was used to describe the Davis-Besse incident and was sent to plaintiffs and other licensees in January 1978.[3] No further warning or information was given to plaintiffs, and their operating license was issued by the Commission in February 1978.

The theories of liability asserted in the complaint are negligence, negligence per se, and the "Good Samaritan" rule of the Restatement (Second) of Torts §§ 323 and 324A. Plaintiffs allege that they relied on the Commission but it failed to exercise due care in the performance of its undertakings. The district court concluded that the Energy Reorganization Act imposed a duty on the Commission to monitor the nuclear energy industry and alert licensees to safety problems.

Although the district court construed the complaint to essentially allege a failure to warn, it determined that the misrepresentation exception to the Tort Claims Act did not apply because the plaintiffs' losses were the result of the government's failure to disclose safety, not commercial, information. The district judge also rejected the Commission's contention that the discretionary function exemption barred the suit, observing that the "governing standards are not so vague or inexact as to call for unfettered scientific 'discretion.' " When decisionmakers exceed the scope of applicable regulations, he reasoned, the government cannot invoke the discretionary function exception.

After denying the motion to dismiss, the court certified the following question for immediate interlocutory review: "Is our decision correct that neither the misrepresentation nor the discretionary function exception bars this suit?"

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3 There is no reference to this report in the plaintiffs' complaint, but the district court observed that "plaintiffs do not, however, contest defendant's assertion that they received a Licensee Event Report."

Because the statutory exceptions constitute retentions of the sovereign immunity that is otherwise waived in the Act, a negative answer to either of the grounds for the district court's decision will require dismissal of the plaintiffs' suit. We do not discuss the misrepresentation issue because we conclude that the discretionary function exception applies to this case.[4]

One of the cases relied on by the district court in reaching its conclusion was *United Scottish Insurance Co. v. United States*, 692 F.2d 1209 (9th Cir. 1982). Shortly after the district court issued its order, the Supreme Court granted certiorari in *United Scottish* and consolidated it with *S.A. Empresa De Viaco Aerea Rio Grandense (Varig Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982). The Supreme Court had not decided those cases when the case at bar was presented to this panel. In view of their relevancy, we chose to await the Court's action. Following the Court's reversal of both cases, *United States v. S.A. Empresa De Viaco Aerea Rio Grandenese (Varig Airlines)*, 52 U.S.L.W. 4835 (June 19, 1984), we asked the parties to comment on the decision.

In the *Varig* cases, the plaintiffs asserted liability against the United States under the Tort Claims Act on allegations that the Federal Aviation Administration had negligently certified commercial aircraft. In each instance, an in-flight fire had caused damage to the plane resulting in deaths and injuries.

Suits were brought by representatives of the deceased passengers and the owners of the planes. The plaintiffs contended that the FAA certified the planes despite nonconformity with the agency's fire protection standards and, because of this negligence, the government was responsible in damages.

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4 Section 2680(a) provides that the Torts Claims Act shall not apply to:

> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C. § 2680(a).

The Supreme Court disagreed, stating that when the discretionary function exception is invoked the basic inquiry is "whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." 52 U.S.L.W. at 4837. The discretionary function exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.*

In the legislative history, the Court discerned a marked emphasis on protection for regulatory activities. This suggested that an underlying basis for excepting discretionary functions was a congressional desire to prevent the use of a tort action as a vehicle for "judicial 'second guessing' " of administrative decisions grounded in social, economic, and political policy. *Id.*

The Court reviewed the FAA's design regulations as well as its compliance procedures and concluded that when an agency determines the extent to which it will supervise the safety procedures of private individuals, it "is exercising discretionary regulatory authority of the most basic kind." *Id.* at 4839. The Court noted that FAA employees conducting compliance reviews "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id.*

In holding that the plaintiffs' suits were barred, the Court also discussed *Dalehite v. United States*, 346 U.S. 15 (1953), a decision whose continued vitality had been questioned in recent years. The Court rejected "the supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception." 52 U.S.L.W. at 4837.

Dalehite was a claim against the United States for massive damages resulting from a disastrous explosion of fertilizer in the harbor at Texas City, Texas. The government was charged with various acts of negligence: the cabinet level decision to institute the fertilizer program, the failure to conduct further

experimentation into the possibility of explosion, deficiencies in the drafting of a basic plan of manufacture, and the failure to properly police the loading and storage of the fertilizer aboard ships.

In holding for the government, *Dalehite* concluded that the discretionary function exception encompassed more than the initiation of programs and activities. It included determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. "Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 35-36.

Varig and its reaffirmation of *Dalehite* has reduced some of the uncertainty generated by the numerous courts of appeals' decisions that have wrestled with the vague contours of the discretionary exception.[5] Our canvas of authorities is accordingly narrow, and our task is to determine if the actions of the Nuclear Regulatory Commission fall within the *Varig* and *Dalehite* perimeters.

It should be noted that the issue of negligence is not relevant to the discretionary function inquiry. Moreover, in the procedural posture of this case, we assume that the government did not exercise due care. The question is whether the challenged conduct comes within the exception. We consider seriatim the allegations of the plaintiffs' complaint.[6]

The first count charges that the Commission either did not sufficiently investigate the Davis-Besse incident or, having

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5 For a review of some of the pre-*Varig* cases, see Bernitsky v. United States, 620 F.2d 948 (3d Cir.), *cert. denied*, 449 F.2d 870 (1980). *See also* Reynolds, "The Discretionary Function Exception of the Federal Tort Claims Act," 57 GEO. L.J. 81, 82 (1968); Comment, "Scope of the Discretionary Function Exception under the Federal Tort Claims Act," 67 GEO. L.J. 978 (1979).

6 Because of our disposition of this appeal, we need not discuss the "Good Samaritan" theory advanced by plaintiffs since that contention would do no more than establish negligence.

obtained information that could have been used to correct the dangerous condition, failed to convey that information to plaintiffs. Thus, the attack is on the thoroughness of the investigation or, as an alternative, the failure to communicate safety information in the agency's possession.

The Energy Reorganization Act gives the Commission the responsibility to "[r]eview the safety and safeguards of all [nuclear] facilities, materials, and activities." 42 U.S.C. § 5843(b)(2). The statute specifies that "such review functions shall include but not be limited to—(A) monitoring, testing and recommending upgrading of systems designed to prevent substantial health or safety hazards." *Id.* The Commission is also required to submit reports on "abnormal occurrences"—"an unscheduled incident or event which the Commission determines is significant from the standpoint of health or safety." *Id.* § 5848.

To assist the Commission in the performance of its safety function, section 206 of the Act requires owners and operators to notify the agency when a facility "contains a defect which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate." *Id.* § 5846(a)(2). To insure compliance, the Commission "is authorized to conduct such reasonable inspections and other enforcement activities as needed." *Id.* § 5846(d).

Although the statute directs the Commission to review the safety of nuclear facilities, the means of accomplishing that duty has been left to the agency. Section 203(b)(2) provides a nonexhaustive listing of "review functions" and, by implication, allows the Commission to add others. For example, the agency has, by regulation, undertaken a program of "notifying licensees regarding generic problems so as to achieve precautionary or corrective measures." 10 C.F.R. § 1.64 (1978).

The Act also assigns to the Commission the determination of what events constitute an "abnormal occurrence" or a "substantial safety hazard" that triggers the obligation of owners and operators to report defects, *see* 10 C.F.R. § 21.3(k) (1978). As to enforcement, the agency has the authority, not only to

conduct inspections, but to develop "other enforcement activities as needed." Thus, the Commission has decided that it may, in some circumstances, issue a Bulletin requiring licensees to take specific action in aid of the investigation and evaluation of an event.

In *Varig*, the plaintiffs challenged the FAA's practice of insuring compliance through a "spot check" system and its use on the defective planes. *See* 52 U.S.L.W. at 4838-39. The Court found both actions within the discretionary exemption stating, "Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program." *Id.* at 4839. Agencies are required to balance "the objective sought to be obtained against such practical considerations as staffing and funding." *Id.* Therefore, the FAA's alleged failure to check specific items in the course of certification fell squarely within the discretionary function exception of section 2680(a).

That same analysis applies to the circumstances here. Congress has directed the Commission to pursue safety-related functions in the nuclear energy field, but has left implementation to the agency's " 'judgment of the best course.' " *Varig*, 52 U.S.L.W. at 4838 (quoting *Dalehite*, 346 U.S. at 34). Thus, the Commission determines what information should be collected and how, whether incidents are to be investigated and in what manner, and what data should be disseminated and in what form. In formulating the means to accomplish its regulatory objectives, the agency must engage in the same balancing the Court spoke to in *Varig*.

That reasoning is no less applicable to the plaintiffs' allegation that the Commission's investigation of the Davis-Besse incident was wanting. Limitations on an investigation into matters that come within the regulatory control of the Commission are no different in principle than the FAA's use of a spot check system. The intensity and breadth of an investigation is necessarily influenced by the resources available, both in terms of technically-trained personnel and funding. Of necessity, judgments must be made as to priorities and allocations of resources.

That in hindsight the Commission's judgment may have been ill-advised in no way changes the character of the function under scrutiny. The extent and scope of an investigation remains a matter of the agency's discretion. As this court stated in *Bernitsky v. United States*, 620 F.2d 948, 955 (3d Cir. 1980), "Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments."

Count I's accusation of failure to furnish information in the agency's possession has several aspects. Plaintiffs complain that, although it should have been widely disseminated, "vital information regarding safety hazards was not sent out in any form." A fair statement of their position is not that they were totally unaware of the Davis-Besse occurrence, but that the Commission had specific data that it was under a duty to circulate to all who might be affected by a similar hazardous condition.

In essence, plaintiffs challenge the Commission's failure, on the basis of the information it had, to characterize the Davis-Besse event as either an "abnormal occurrence"—which the statute required it to report—or a "generic problem"—for which the regulations specified notification. They argue that because of the possible catastrophic consequences of a valve failure, the Commission had no discretion under the governing statutes and regulations—it was duty bound to report the incident.

Use of the word discretion in this sense exposes the fundamental flaw in the plaintiffs' position. The exemption from the Tort Claims Act is based on the nature of the governmental discretionary function, not whether there is an option to choose. Regulatory activities are within the exemption, not because alternatives exist in particular circumstances, but because of the fundamental character of the role assigned to the agency.

If a government employee performing a discretionary function acts negligently, the exemption remains applicable even though the activity constitutes an abuse of discretion. As the

statute itself provides, discretionary functions are exempt "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Energy Reorganization Act's mandate that the Commission provide information on "abnormal occurrences" is triggered by the happening of "an unscheduled incident or event which the Commission determines is significant from the standpoint of public health or safety." 42 U.S.C. § 5848. Thus, before the obligation to disseminate information attaches the Commission is required to judge whether the incident raises concerns about public health or safety.

The legislative history leaves no doubt that this determination has been entrusted to the discretion of the Commission. The Senate had left "abnormal occurrence" undefined in its bill, but intended that the Commission develop "uniform criteria." Sen. Rep. No. 980, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5470, 5531. The Conference Committee, however, added the definition that appears in the statute "to make it clear that the Commission will determine which abnormal occurrences are significant enough to be reported." Conf. Rep. No. 1445, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5538, 5551.

Whether an event is significant from the standpoint of health or safety may be easily determined in some situations—perhaps even by a layman unacquainted with nuclear energy technology. In other instances, however, it may require scientific sophistication to understand the factual data before even approaching the second question of effect on public health and safety. The Commission's manual on "abnormal occurrences" states that "[w]hether a particular event will be determined to be an abnormal occurrence will depend on the specific facts and circumstances of the event."

The plaintiffs' theory—that the Davis-Besse event gave no alternative but to report—must not be allowed to obscure the nature of the Commission's function: that is, to determine on the basis of information in its possession whether a specific event constitutes "an abnormal occurrence" that requires notification to Congress and the public. This is not a mere

ministerial task. Technical and scientific evaluations of nuclear processes and facilities must be taken into account along with considerations of public health and safety—matters within the specialized knowledge of the Commission.

In following the dictates of the statute, the Commission is unquestionably acting in its role as regulator of the conduct of private individuals. *See Varig*, 52 U.S.L.W. at 4837. Moreover, excluding the Commission's role from the scrutiny of a tort action provides an example of the underlying reason for the discretionary function exclusion—to prevent judicial second-guessing.[7]

There is no substantial distinction between the choice made by the FAA as to its method of inspection and decisions made by the Nuclear Regulatory Commission to classify certain incidents as statutory "abnormal occurrences." If anything, the discretion entrusted to the Commission would seem to be greater than that given the FAA.

In *Dalehite*, the Court used very broad language—"where there is room for policy judgment and decision there is discretion." 346 U.S. at 36. The discretionary tag the Court attached to the government's specifications of bag labels and bills of lading in *Dalehite, see id.* at 39, implicate far less of a policy determination than the classification of a nuclear event as an abnormal occurrence.

Plaintiffs rely on our case of *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974), as excluding professional and scientific judgments from the discretionary category. *Griffin* con-

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7 After defining "abnormal occurrence," section 208 of the Energy Reorganization Act continues: "Nothing in the preceding sentence shall limit the authority of a court to review the determination of the Commission." 42 U.S.C. § 5848. Although this provision might appear to suggest some relaxation of the opposition to judicial "second-guessing" of the Commission's determination, there is a marked difference between direct judicial review of an agency decision and contesting that decision through the medium of a tort suit. Not only are the standards in the two proceedings likely to differ, but a tort action could have an undesirable inhibiting effect on official activity and decisionmaking. *See* United States v. Muniz, 374 U.S. 150, 163 (1963).

trasted that type of decisionmaking with policy determinations in the social and economic realm. *Griffin*, however, must be read cautiously because in *Varig* the discretionary exception covered an agency decision that rested on highly technical information.[8] In any event, we find a distinct difference between applying rigid scientific specifications in a testing procedure and the making of a judgment on public health and safety after evaluating the happening of an out of the ordinary event at a nuclear power facility.

What we have said is equally applicable to the plaintiffs' contention that it should have been given information about the Davis-Besse incident because the Commission knew or should have known that the problems at the Ohio plant were "generic." *See* 10 C.F.R. § 1.64. The same considerations and balancing that go into the agency's determinations about investigation, evaluation, and information exchange are at work in the identification of generic problems. The program for notifying licensees of generic problems is but one part of the overall discretionary function the Commission undertakes when it monitors the safety of the nuclear industry.

We conclude, therefore, that Count I of the plaintiff's complaint comes within the discretionary function exemption. Count II, which alleges that the Commission failed to exercise due care in licensing the Three Mile Island plant, requires less discussion. An agency entrusted with the task of approving entities for licensing is engaged in activity that is at the heart of the regulatory function.

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8 In *Griffin*, the government was found liable for negligent approval of a batch of polio vaccine. The panel majority held the discretionary function exception inapplicable because the "decision involve[d] not public policy but a scientific judgment as to the accuracy of test results." 500 F.2d at 1066 n. 16. In addition, the government employees had relied on a factor not in the regulations, and the court held that "[t]he violation of a discretionary command takes what otherwise might be characterized as a 'discretionary function' outside the scope of the statutory exception." *Id.* at 1068-69. Judge Van Dusen dissented, concluding that a function was no less discretionary because it was scientific. We need not determine the continued vitality of *Griffin* here, but note that our pre-*Varig* cases on the discretionary function must be re-evaluated.

Section 2232 of the Atomic Energy Act of 1954, 42 U.S.C. § 2232 (1982), governs the Commission's review of license applications, *see id.* at § 5843(b). Applicants are to submit "such information as the Commission . . . may determine to be necessary to decide" the qualifications of the applicant and such technical information "as the Commission may. . . deem necessary in order to enable it to find that utilization or production of special nuclear material . . . will provide adequate protection to the health and safety of the public." The statute allows the Commission to determine what amount of information is needed when it is passing on an application for a license.

Exercising its authority, the Commission decided to consider numerous factors. These include the site for the facility, its design, the materials and method of construction, the plant's safety features and procedures, the financial qualifications of the applicants, the technical expertise of the operators, and the adequacy of the applicants' quality assurance program for all stages from design through operation. *See* 10 C.F.R. Parts 50 (facilities), 55 (operators), 100 (site criteria). Each of these considerations is part of the Commission's overall objective of ascertaining whether there is a reasonable assurance that the nuclear facility can be operated without endangering the health and safety of the public. 10 C.F.R. §§ 50.35(c), 50.57(a)(3) (1978).

Plaintiffs allege that the Commission acted negligently when it approved the Babcock & Wilcox design because the agency "should have known that it was necessary to require manufacturers . . . to analyze small breaks in the reactor coolant system such as a stuck-open pilot-operated relief valve." According to the complaint, the safety analyses submitted by Babcock & Wilcox generally considered small breaks of only about five square inches. The valve that malfunctioned in the Three Mile Island incident had an aperture of approximately one square inch.

When an agency determines the amount of information needed to fulfill its regulatory mission, it is exercising the

essence of a discretionary function. *Varig* leaves no doubt on that score. As we noted earlier, an action will not lie under the Tort Claims Act for an abuse of the agency's discretion.

It is also appropriate to take note of statements on the Commission's licensing role in the congressional Conference Report to the Energy Reorganization Act. After pointing out that the Commission would have certain research capabilities that "may be characterized as confirmatory assessment," the Report states that "[i]f the license application is inadequate *in any respect considered significant by the regulatory agency*, the license is refused." Conf. Rep. No. 1445, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5538, 5548 (emphasis added). The Report continues:

> "It would be a serious mistake, however, to make a regulatory agency responsible for the performance of research that goes beyond the need for confirmatory assessment. . . . The regulatory agency should never be placed in a position to generate, and then have to defend, basic design data of its own. . . .
>
> "As with research, the regulatory agency need not and should not perform process development, develop construction procedures or designs, or conduct quality control work (which is the responsibility of the licensee or vendor). . . . The regulatory agency should not assume any part of the burden of the applicant to prove the adequacy of a license application."

Id. at 5548-49.

It is the burden and responsibility of the applicant to demonstrate the adequacy of its application. The Commission's obligation is to assess the application according to what the agency determines is significant from the standpoint of health or safety. The exercise of this authority falls squarely within the discretionary function. Therefore, Count II is also excluded by the discretionary function exemption of the Tort Claims Act.

Consequently, in response to the question submitted by the district court, we answer that the discretionary function exception is a bar to the plaintiffs' suit in this case. This case will therefore be remanded to the district court for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 81-4950

Nov. 24, 1982.

GENERAL PUBLIC UTILITIES CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY

v.

UNITED STATES OF AMERICA.

DAVID KLINGSBERG, James B. Liberman, New York City, Samuel B. Russell, Allen Seltzer, Reading, Pa., *for plaintiffs.*

JAMES P. KLAPPS, Asst. Director, Torts Branch, J. Paul McGrath, Asst. Atty. Gen., Civ. Div., Dept. Justice, Roxanne K. McKee, Michael B. Blume, Trial Attys., Torts Branch, Civ. Div., Dept. Justice, James A. Fitzgerald, Acting Sol. Nuclear Regulatory Com'n, Washington, D.C., Peter F. Vaira, Jr., U.S. Attorney, Philadelphia, Pa., *for defendant.*

MEMORANDUM AND ORDER

TROUTMAN, *District Judge.*

Background

In the early morning hours of March 28, 1979, a turbine generator at plaintiffs'[1] Three Mile Island Unit 2 nuclear

1 Plaintiff, General Public Utilities Corp. (GPU), is an investor-owned public utility holding company operating pursuant to the Public Utility

facility (TMI), designed by Babcock & Wilcox (B & W), experienced a shutdown "trip" due to a loss of feedwater. Subsequently, a rapid heat buildup raised the pressure in the reactor coolant system and caused a pilot-operated relief valve to open, thereby relieving excess pressure. Shortly thereafter, the reactor shut down and pressure in its coolant system dropped to within the normal range; the pilot-operated relief valve should have closed. It failed to do so. Worse, the instrumentation designed to indicate the true position of the relief valve also failed; it incorrectly indicated that the valve was closed when, in fact, it was open.

Thereafter, a "loss-of-coolant accident" occurred; significant quantities of coolant water and steam were lost through the malfunctioning valve. As a result thereof, pressure in the reactor coolant system continued to drop and coolant water and steam escaped. Within a few minutes of the original "trip", the engineered safety system began high-pressure injection of water into the reactor coolant system.

Continued monitoring by plant operators incorrectly lead them to believe that the facility was "going solid"; i.e., that the pressurizer was dangerously close to filling with water. Following B & W generated and Nuclear Regulatory Commission (NRC) approved procedures, and attempting to guard against this eventuality, TMI operators reduced the high pressure injection of water into the coolant system and initiated maximum let-down of coolant. The reduction of high-pressure coolant injection exasperated the developing problem; i.e., coolant which escaped through the malfunctioning valve was not replaced.

Within one or two hours of the original "trip", TMI operators, again acting pursuant to B & W established and NRC approved procedures, shut down the plant's four reactor coolant pumps which normally circulate coolant through the

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Holding Company Act of 1935, 15 U.S.C. § 79. GPU owns all the common stock of its co-plaintiffs, Jersey Central Power & Light Company (JCP & L), Metropolitan Edison Company (Met Ed), and Pennsylvania Electric Company (Penelec). For the sake of clarity, these parties will simply be referred to as "plaintiffs".

reactor vessel. Once this occurred, the reactor vessel was deprived of the coolant water and steam which had previously circulated through it, the nuclear core began to uncover and it, along with the protective cladding, was severely damaged. Radioactive material from the damaged core spread throughout the building and adjacent structures. As a result, the public was exposed to catastrophic dangers. The resulting damage to plaintiffs is allegedly in excess of four billion dollars.

The complaint further alleges that eighteen months earlier, on September 24, 1977, a "loss-of-coolant" accident occurred at the Davis-Besse nuclear power plant designed by B & W and operated by Toledo Edison Company. Importantly, the accident at Davis-Besse closely paralleled the events which later occurred at TMI. The ultimate consequences of terminating high pressure injection at Davis-Besse were, however, severely mitigated by the fact that the Ohio plant was only operating at 9% capacity at the time of its accident. TMI, by contrast, was operating at 97% capacity.

Plaintiffs assert that the NRC failed to properly disseminate information to them regarding the cause of the Davis-Besse accident and also the corrective measures subsequently developed to prevent similar accidents. Moreover, plaintiffs complain that the NRC negligently approved the TMI construction plans, containing the faulty pilot-operated relief valve at a time when it knew, or should have known, that the valve could stick and cause a "loss-of-coolant" accident.

The two-count complaint seeks recompense in Count I for the purported failure of defendant, United States, acting through its agent, the NRC to properly warn and advise plaintiffs of existing hazards and defects in their plant. Count II inveighs against the NRC's purported negligent approval of B & W's emergency procedures. Specifically, the complaint asserts three grounds for relief: breach of the Good Samaritan duty[2], negligence, and negligence *per se*.

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2 *See*, Restatement of Torts (2d) which provides:

§ 324 A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the

Jurisdiction is predicated upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b)[3] (FTCA), which generally imposes govern-

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protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

This method of imposing liability is recognized by federal courts as the law of Pennsylvania, *Evans v. Liberty Mutual Insurance Co.*, 398 F.2d 665 (3d Cir. 1968) and may be used by plaintiffs to affix governmental liability in a Federal Tort Claims Act suit. *Toppi v. United States*, 327 F.Supp. 1277 (E.D. Pa. 1971). *See also, Blessing v. United States*, 447 F.Supp. 1160 (E.D. Pa. 1978). Additionally, Pennsylvania recognizes negligent inspection as an actionable tort. *Mays v. Liberty Mutual Ins. Co.*, 323 F.2d 174 (3d Cir. 1963); *Evans v. Otis Elevator Co.*, 403 Pa. 13, 168 A.2d 573 (1961). Most recently, § 324A and its companion, § 323 of the Restatement of Torts (2nd), were applied to a claim arising out of a maritime accident brought under the Suits in Admiralty Act, 46 U.S.C. § 742. *See, Patentas v. United States*, 687 F.2d 707 (3d Cir. 1982).

§ 323 of the Restatement provides:

Negligent Performance of Undertaking to Render Services.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

3 28 U.S.C. § 1346(b) provides that

[s]ubject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

mental liability, *inter alia*, "under circumstances where the United States, if a private person, would be liable". Resolution of the Government's motion to dismiss[4] requires construction of two important exceptions to the general abrogation of sovereign immunity contained in the FTCA. The "misrepresentation exception", 28 U.S.C. § 2680(h), prevents the imposition of governmental liability on any claim arising out of, *inter alia*, a "misrepresentation". The "discretionary function" exemption, 28 U.S.C. § 2680(a), shields governmental conduct from liability where the claim is grounded in "the failure to exercise or perform a discretionary function or duty". It applies even where there is an abuse of discretion. *Dalehite v. United States*, 346 U.S. 15, 33-36, 73 S.Ct. 956, 966-68, 97 L.Ed. 1427 (1955).

The Government's Duty

Plaintiffs asseverate that the NRC breached its duty to warn of design hazards when it failed to employ either of the two primary methods which it uses to provide licensees with safety information. The first is the issuance of an "IE Bulletin". When the NRC determines that a specified event may have "generic" applicability, it issues an IE Bulletin in order to "achieve appropriate precautionary or corrective action" by nuclear licensees and operators. 10 CFR § 1.64. The NRC also requires that all IE Bulletins be responded to so that it, the NRC, may "assess [ ] the situation". *See, U.S. Nuclear Regulatory Commission, Office of Inspection and Enforcement, Inspection and Enforcement Manual* (Manual), Chapter 1100, MC 1125-031. The second mode of NRC licensee notification is the distribution of "Circulars". These are designed simply to

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4 Fed.R.Civ.P. 12(b)(1) and (6). For present purposes we assume the veracity of plaintiffs' factual allegations. *Walker Processing Equipment Co. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965). We do not, of course, accord this same deference to the conclusion of law contained in the complaint. *Frederiksen v. Poloway*, 637 F.2d 1147, 1150 n. 1 (7th Cir.), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

"inform the licensee or permit holder" of issues regarding "safety, safeguards, or environmental interest". *Id.* at MC1125-032. Importantly, Circulars do not require a licensee's response to the NRC; they generally signify a lesser degree of "danger" than does an IE Bulletin.

The final information gathering and dissemination function which the NRC performs is the compilation and submission of "abnormal occurrence" reports to the Congress. An "abnormal occurrence" is defined as, *inter alia*, a "major deficiency in design, construction, use of, or management" of a licensed nuclear facility. *See*, Energy Reorganization Act of 1974, (Energy Act) § 208, 42 U.S.C. § 5848. Importantly, plaintiff asserts that it is among the intended beneficiaries of the NRC's statutory obligation.

In any event, after the Davis-Besse accident, the NRC neither distributed an IE Bulletin, Circular, nor issued an abnormal occurrence report to the Congress. (Plaintiffs do not, however, contest defendants' assertion that they received a Licensee Event Report, issued by the Office of Resource Management, NRC, regarding the Davis-Besse accident.) Rather than issue any warning, the Government approved plaintiffs' construction plans; this notwithstanding the fact that they called for inclusion of the faulty pilot-operated relief valve. Plaintiffs contend that their license issuance, which authorized them to operate an incorrectly designed plant, and the failure to widely disseminate corrective measures designed after Davis-Besse, violated defendant's duty to monitor the nuclear power industry and to warn licensees of dangerous practices and conditions.

Before turning to issues raised by the misrepresentation and discretionary function exceptions, the Government argues a very basic tort concept: that the NRC owes no duty to plaintiffs or the nuclear power industry. Defendant asserts that the myriad of regulatory activities and standards promulgated by the NRC simply describe minimal safety standards to which the industry must adhere. Moreover, defendant argues that all of these regulations are designed to and, in fact, inure only to the benefit of the public. An evaluation of the relevant statutes, regulations and legislative history establishes, however,

that the relationship between the NRC and the nuclear industry contains elements of symbiosis, which *may* form the predicate for imposing liability.

Specifically, the Government's statutory and regulatory obligations imposed by §§ 206 and 208 of the Energy Act, 42 U.S.C. §§ 5846 and 5848, and the regulations promulgated thereunder, create a duty on behalf of the Government to properly and carefully regulate, monitor and warn the nuclear power industry of existing dangers.

For example, § 206 of the Energy Act, 42 U.S.C. § 5846(a)(2), requires nuclear plant operators to notify the NRC of any plant "defect" which rises to the level of a "substantial safety hazard". Moreover, § 208 of the Energy Act, 42 U.S.C. § 5848, directs the NRC to prepare quarterly Congressional reports listing "abnormal occurrences" at nuclear facilities. Additionally, the NRC is charged with providing "wide dissemination" of "abnormal occurrence" reports.

Because the legislative history of the Energy Act cross references §§ 206 and 208, 42 U.S.C. §§ 5846 and 5848, the reports of defects made to the Commission pursuant to § 206 inure to the benefit of electric utilities. These same reports frequently form the basis of the Commission's Congressional "abnormal occurrence" reports, mandated by § 208 of the Energy Act and receive industry-wide dissemination. Hence, plaintiffs are one of the intended beneficiaries of those statutory provisions.

The fact that §§ 206 and 208, 42 U.S.C. §§ 5846 and 5848, run to plaintiffs' benefit finds support in the legislative history of the Energy Act as well. Specifically, S.Rep. No. 980, 93rd Cong., 2d Sess. *reprinted* in 1974 U.S.Code Cong. & Admin.News 5470, 5527-28, demonstrates that Congress "intended" the obligation of licensees to report safety defects to the appropriate governmental authorities to benefit "electric utilities in particular". The Senate report noted that valves were "the most frequent components involved in abnormal occurrences . . . the breakdown of a valve has potentially catastrophic implications". *Id.* Continuing, the report virtually predicated many of the events which were to occur at TMI and observed that

> [t]he system most requently involved in abnormal occurrences . . . was the primary cooling system, which is used to prevent a meltdown of the nuclear core of a reactor. The system next most frequently affected by defects . . . was the emergency core cooling system, which prevents a meltdown in case the primary cooling system fails. A meltdown is the worst conceivable reactor accident; such an accident could result in breaching of the containment vessel of a powerplant and in the release of radioactive fallout equivalent to many Hiroshima bombs.

Id. The report finally notes that the combined effect of industry reporting safety defects to the Government, 42 U.S.C. § 5846, and the requirement that the Commission report "abnormal occurrences" to the Congress on a quarterly basis, 42 U.S.C. § 5848, will "substantially ungrade the Federal response to defects in all licensed nuclear facilities". 1974 U.S.Code Cong. & Admin.News at 5528. Upon signing the Energy Act, President Ford echoed a similar sentiment and observed that the NRC will be "fully empowered to see to it that reactors using nuclear materials will be properly [ ] designed [and] constructed". Presidential Documents: Gerald R. Ford, Vol. 10; Number 41, p. 1271, 1273 (October 11, 1974).

Two particularly important regulations promulgated pursuant to the Energy Act also merit consideration. As noted, *infra*, 10 CFR § 1.64 requires the Office of Inspection and Enforcement to "notify licensees regarding *generic* problems so as to achieve appropriate precautionary or corrective actions". (emphasis added). Plaintiffs' contention is, of course, that the defect which existed at Davis-Besse was improperly designed into their plant and was "generic" in nature. Further, that the NRC not only failed to disseminate "appropriate precautionary or corrective actions", *Id.*, but also it *approved* TMI's plans notwithstanding the fact that they contained a "generic problem".

The NRC's duty to monitor the industry and warn of safety problems does not, however, amount to a *guarantee* of plant safety. Far from it. 10 CFR 60, App. B, clearly specifies that

although the licensee may delegate its obligation to establish and execute quality assurance programs, the licensee nevertheless "shall retain responsibility therefor". *Id.*

Accordingly, we conclude that the Act's plain language, legislative history, and regulations, support plaintiffs' assertion that the NRC has undertaken *some* duty to carefully monitor nuclear experiences and to disseminate appropriate warnings. Moreover, this duty runs, *inter alia*, to the nuclear power industry. *See also, Regulation of Nuclear Power Reactors and Related Facilities*, 16 Atomic Energy Law Journal 256 (1974).

Application of the Federal Tort Claims Act

The existence and alleged breach of the duty does not, however, end our inquiry. If the purported breach occurred through a misrepresentation or the exercise of discretion, suit is nevertheless barred. As such, the mere breach of a duty may be an insufficient predicate to impose liability. *United States v. Neustadt*, 366 U.S. 696 at 710-11, 81 S.Ct. 1294 at 1302, 6 L.Ed.2d 614; *Green v. United States*, 629 F.2d 581, 584 (9th Cir.1980) ("[T]he existence of a duty on the part of the Government to provide information to plaintiffs [does not] render the [misrepresentation] exception inapplicable"); *Preston v. United States*, 596 F.2d 232, 238 n.9 (7th Cir.), *cert. denied*, 444 U.S. 915, 100 S.Ct. 228, 62 L.Ed.2d 169 (1979) (where the breach of an existing duty occurs through a misrepresentation, suit is barred.) *Accord, Cross Brothers Meat Packers, Inc. v. United States*, 533 F.Supp. 1319, 1323 (E.D.Pa. 1982).

Misrepresentation Exception

We now turn to the "misrepresentation" exception. Plaintiffs contend that the governmental duty owed to them was breached by the NRC's negligent failure to properly perform its undertaking of nuclear plant inspection, licensing and distribution of supplemental safety notices. The NRC, on the other hand, characterizes the complaint as alleging only a negligent misrepresentation; i.e., by failing to warn when there was a duty to do so, it misrepresented to plaintiffs the fact that the plant was safe when, in reality, it was not.

The FTCA's "misrepresentation exception" includes a jurisdictional prohibition against suits for "negligent misrepresentation". *United States v. Neustadt*, 366 U.S. at 706-07, 81 S.Ct. at 1300. Additionally, the Supreme Court has cautioned that our inquiry necessitates "looking beyond the literal meaning" of the complaint to determine the "real" cause of action. *Id.* at 703, 81 S.Ct. at 1298. This frequently "decisive and difficult" task requires separating cases of "true negligence" from those of "misrepresentation in negligence's clothing".[5] *Cross Brothers Meat Packers v. United States*, 537 F.Supp. 204 at 205 (E.D.Pa. 1982) (denying motion to reconsider).

The initial issue then becomes one of characterization. Does the complaint at bar sound in "negligent misrepresentation" or "negligence"? The inquiry is a difficult one and conflicts between decided cases are not subject to facile resolution.

Two Supreme Court cases highlight the conflicting lines of authority. *United States v. Neustadt, supra*, and *Indian Towing v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

Neustadt involved a couple who obtained FHA mortgage approval prior to the purchase of their home. Specifically, defendant therein, the FHA, approved the mortgage application for $24,000. Structural damage manifested itself shortly after plaintiffs closed on the house. Plaintiffs, claiming that they relied upon the FHA's valuation of the house when they

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5 Interestingly, plaintiffs have a suit currently pending against B & W, the plant designers. The allegations there track the ones at bar and complain generally that defendant therein knew of the Davis-Besse accident and nevertheless completed construction of the TMI plant with the faulty pilot-operated relief valve. Moreover, plaintiffs complain in the other suit that B & W promulgated safety regulations designed to avoid a similar accident and that they failed to notify plaintiffs of the new procedures. The complaint against B & W sounds in *misrepresentation* and not negligence. Here, of course, plaintiffs assert that similar allegations purportedly sound in negligence and not misrepresentation.

Recently, the New York Court granted B & W's motion for summary judgment on all of plaintiffs' claims grounded in strict liability. *See, General Public Utilities Corp. v. Babcock & Wilcox Co.*, 547 F.Supp. 842 (S.D.N.Y.1982).

prepared their offer, sued for the difference between the FHA's appraised value and the house's fair market value.

The Supreme Court held that the FHA negligently misrepresented the house's value to plaintiffs, but that the suit was barred by the misrepresentation exception. The Court also observed that the FTCA's misrepresentation exception generally governs governmentally transmitted "information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs", and is confined "very largely to the invasion of interests of a financial or commercial character in the course of business dealings". 366 U.S. at 710 and 711 and n. 26, 81 S.Ct. at 1302 and n. 26.

In *Indian Towing, supra*, the Coast Guard undertook to operate a lighthouse off the Louisiana coast. Having assumed "operational control" of the lighthouse, the Coast Guard failed to properly maintain it. The court held that once the Government had undertaken control of the lighthouse it was then obligated to maintain it in proper working order. The negligent failure to properly do so provided a liability-creating predicate.

The parallel between the case at bar and *Neustadt* and *Indian Towing* is obvious. Plaintiffs contend that the NRC's statutory and actual assumption of the duty to inspect and approve license applications, operating procedures and design specifications, etc., is much like the beacon which the Coast Guard provided to warn mariners in *Indian Towing*. Since the duty was purportedly breached, plaintiffs urge that the Government's motion to dismiss must be denied.

The Government, on the other hand, views the case as falling squarely within the line of cases which follow *Neustadt*. Its assertion is that a look beyond the literal wording of the complaint discloses, at best, a simple negligent misrepresentation to plaintiffs of their plant's safety. Moreover, the NRC's purported failure to warn can amount to a negligent misrepresentation by omission since the exception applies to cases where "mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of the damages". *City & County of San Francisco v. United States*, 615 F.2d 498, 505 (9th Cir.1980), *quoting, National Mfg. Co. v. United States*, 210 F.2d 263, 276 (8th Cir.1954).

The case at bar actually represents a hybrid case falling somewhere between *Neustadt* and *Indian Towing*. The *Indian Towing* line of cases usually involves the negligent "operational control"[6] of the harm-causing instrumentality. Damages generally are expressed in terms of personal injury or loss of property. The cases which follow *Neustadt* concern governmental transmission of false or inadequate information which results in damages flowing from commercial decisions based thereon. Under *Neustadt*, there is no "operational control" and frequently no liability. *Green v. United States*, 629 F.2d at 581. In the case at bar, we have the *Neustadt* element of the transmittal of false information coupled with the *Indian Towing* element of property damage.

We recognize that the characterization of plaintiffs' complaint as sounding in actionable negligence or in inactionable negligent misrepresentation is not free from doubt and that the decided cases are not fully reconcilable, *Green v. United States*, 629 F.2d at 585. Nevertheless, we conclude that the NRC's lack of "operational control" of TMI[7], coupled with plaintiffs' allegations of "misrepresentation" in the B & W suit[8] and the NRC's "failure to talk" here, warrants our conclusion that the suit sounds in negligent misrepresentation

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6 Plaintiffs asseverated at oral argument that "operational control" is not a *sine qua non* for imposing governmental liability. Rather, they argue that liability may be imposed if the Government fails to warn of a dangerous condition after engendering reliance. This theory is supported by *S.A. Empresa De Vincas Aerea Rio Grandense (Varig Airlines) v. United States*, 81-5366 (9th Cir. October 8, 1982) and *Barnson v. United States*, 531 F.Supp. 614 (D.Utah 1982) (denying motion to dismiss a complaint grounded in the Government's inspection of a privately owned, federally licensed mine.) *See also, Blessing v. United States*, 447 F.Supp. 1160 (E.D.Pa.1978). However, in most cases in which governmental liability is found, *some degree* of operational control frequently exists.

7 Plaintiffs correctly argue that *Toole v. United States*, 588 F.2d 403 (3d Cir.1978), imposed liability absent operational control of the harm-causing instrumentality. However, *Toole* did not address the misrepresentation exception and did not consider whether the lack of operational control would affect the Court's characterization of the suit as sounding in negligence or misrepresentation.

8 *See*, note 5, *supra*.

as defined in *Neustadt* and its progeny. This does not, however, end our inquiry.

Most of the cases which discuss the *scope* of the misrepresentation exception opine that it is limited "very largely", *Neustadt*, 366 U.S. at 711 and n. 26, 81 S.Ct. at 1302 n. 26, to the invasion of financial interests or that it is "most often" applicable to suits alleging improper governmental evaluation of economic factors. *Ramirez v. United States*, 567 F.2d 854, 856 (9th Cir.1977). Plaintiffs, therefore, argue that notwithstanding any characterization of their complaint as sounding in "negligent misrepresentation", this action is not necessarily barred because the complained of misrepresentation does not relate to the invasion of financial interests. Hence, according to plaintiffs, assuming a negligent misrepresentation, they may nevertheless maintain this suit which seeks recompense for the Government's failure to provide *safety data*, rather than the faulty transmission of information containing an economic forecast.

Countering, the Government urges that the multitude of cases which discuss the misrepresentation bar as being "very largely" confined to cases involving financial interests, does not preclude the possibility that suits based upon misrepresentations of non-financial interests and factors are also barred. Indeed, one court noted that it was "unaware" of any Congressional indication to limit the misrepresentation exception to cases alleging financial or commercial loss and concluded that recovery for personal injury, wrongful death or property damage is also barred. *Lloyd v. Cessna Aircraft Co.*, 429 F.Supp. 181, 187 (E.D.Tenn.1977). Other courts disagree. *See, e.g., Kohn v. United States*, 680 F.2d 922, 926 (2nd Cir. 1982) (the misrepresentation exception bars only those suits seeking damages for commercial decisions predicated upon incorrect or incomplete information.) In any case, most courts continue to hold that the misrepresentation bar goes "most often" to cases involving business transactions. Although there may be and probably are grounds for differences of opinion, we conclude that the scope of the misrepresentation exception is not so broad as to bar this suit.

Our conclusion is not altered by the NRC's attempt to characterize their function as supplying business information

to plaintiffs. True, plaintiffs are claiming economic damage due to their reliance upon the NRC's misrepresentations. However, the type of information relied[9] upon by plaintiffs differs substantially from that which is traditionally discussed in the cases in which suit is barred. *See e.g., Neustadt.* Moreover, the fact that plaintiffs' damages are expressed as business losses does not transform safety misrepresentations into commercial ones. The articulated "test" for determining the type of misrepresentations which occurred is "not whether the injury was economic, but whether it resulted from a commercial decision based upon governmental misrepresentations". *Preston v. United States*, 596 F.2d 232, 239 (7th Cir.1979). Hence, our inquiry focuses upon whether plaintiffs'

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9 *Patentas v. United States*, 687 F.2d 707 at 717, stressed the fact that *reliance* upon the Government's undertaking which induces forebearance from engaging in a similar, private undertaking, is one method of properly alleging a claim under the Good Samaritan rule.

Patentas, authored by Judge Becker, considered whether plaintiffs could maintain suit against the Coast Guard for the faulty inspection of a ship which exploded during the unloading of its oil cargo. The ship, ELIAS, suffered a fire while at sea. Prior to its unloading, a Coast Guard inspector checked to determine whether it was safe to unload the cargo and to be sure that the cause of the fire had been remedied. The Coast Guard determined that the ship was safe when, in fact, it was not. Thereafter, while unloading, the ship exploded killing thirteen people.

Patentas held that the district court properly dismissed the complaint. In discussing the scope of the Government's Good Samaritan liability, the court noted that none of the plaintiffs had known of the purpose of the Coast Guard inspection. The announced role is that *reliance* upon the Government's inspection must be alleged in order to state a claim under the FTCA for failure to conduct a proper inspection.

In the case at bar, plaintiffs have argued that due to the NRC's undertaking, they and the industry forebore from "developing their own private warning system to monitor nuclear operating experience industrywide". *See*, Plaintiffs' Memorandum In Opposition To Defendants' Motion To Dismiss (Document 18) at 66-67, n. 12. Moreover, in a recently filed amended complaint, plaintiffs have specifically alleged the element of reliance as part of their complaint. *See*, Paragraphs 66A, 66B, 66C of plaintiffs' amended complaint.

Accordingly, the *Patentas* rule aids plaintiffs to the extent that this action is not otherwise barred by the misrepresentation exception.

injuries *arise* from an economic or a safety misrepresentation. The fact that the injury *manifested* itself as economic harm is irrelevant to this determination. As the Third Circuit noted, Congress, in enacting the FTCA, "focused its attention upon the *type of governmental activity* that might cause harm, not the *type of harm caused*". *Quinones v. United States*, 492 F.2d 1269, 1280 (3d Cir.1974) (emphasis added). Applying these standards we conclude that plaintiffs have suffered losses due to safety and not commercial misrepresentations and deny defendant's motion predicated upon the misrepresentation exception.

Discretionary Function Exception

We now consider the Government's claim that the "discretionary function exception" bars this suit.[10] Briefly, this exception precludes an FTCA suit against the Government for the harm resulting from the improper exercise of official discretion and is grounded in notions of separation of powers. The Government argues that its decision to issue a license to plaintiffs, to promulgate IE Bulletins, Circulars and to notify Congress of "abnormal occurrences", etc., all involve the exercise of executive discretion which is not subject to judicial scrutiny. For example, defendant argues that prior to the issuance of an "IE Bulletin", NRC officials must exercise their experience, expertise and discretion in determining whether the event is "important", has "potential" for being "generic in nature" and whether "timely information is necessary for licensees". *See Manual*, Chapter 1100-1125-041. Similar determinations must be made prior to the issuance of Circulars which consider whether an event "warrants wide dissemination". *Id.* at 1125-042.

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10 In view of our conclusion we need not address plaintiffs' alternate argument that *if* the discretionary function exception is applicable, we should not dismiss the suit *at this juncture*. This argument is grounded on the allegation that the record does not now reveal whether NRC scientists actually made a discretionary decision not to warn of Davis-Besse or whether, through default or caprice, they simply abdicated their responsibility.

In *Griffin v. United States*, 500 F.2d 1059, 1063-66 (3d Cir.1974), the Third Circuit rejected a contention similar to the one which the Government makes today. Here, the Government contends that it employed discretionary decision-making authority in determining how, if at all, to notify nuclear licensees of the Davis-Besse accident and of other so-called "precursors". Defendant asserts that the scientific judgments which it made in determining the "generic" applicability of the Davis-Besse accident are the kinds of decisions of which the discretionary function exception bars review.

Plaintiff in *Griffin* had ingested a live polio vaccine; the Government had previously tested the lot from which it came and certified it as safe. The decision to certify the vaccine required reference by Government scientists to five criteria. Hence, whether the vaccine was safe required exercise of scientific judgment, expertise and discretion by Government scientists.

The court held that the "discretionary function" exception did not bar suit since the judgment involved was of a *scientific* nature and that the discretionary function exception only bars suit predicated upon policy-making decisions; i.e., those which consider the feasibility or practicability of Government programs. *Cf., Dalehite, supra*, (barring suit challenging the Government's decision to create a fertilizer export program using volatile chemicals which resulted in an unprecedented explosion.) The *Griffin* court viewed scientific "judgments", similar to the ones at bar, as essentially ministerial acts performed by Government physicians whose responsibility was "limited" to "merely executing policy judgments" of the Surgeon General. 500 F.2d at 1059. Judge Becker also concluded that regulatory decisions of a scientific or professional character, as opposed to policy-oriented conclusions, are properly reviewable. *Blessing v. United States*, 447 F.Supp. at 1178.

Defendant attempts to distinguish *Griffin* by asserting that the degree of scientific judgment there involved was subject to exact, specific statutory commands, *see e.g., Griffin v. United States*, 500 F.2d at 1062-63, n. 7, whereas here in the NRC's

scientific judgments as to whether an "abnormal event" occurred at Davis-Besse or whether "generic problems" existed, requires reference to broad, inexact statutory commands. Continuing, defendant urges that the lack of specific statutory guidelines within which NRC scientists exercise their "discretion" distinguishes this case from *Griffin*.

We disagree. Although NRC scientists possess judgmental latitude broader than that which existed in *Griffin*, we conclude that the governing standards are not so vague or inexact as to call for unfettered scientific "discretion". Indeed, equally broad exercises of judgment have survived similar challenges.

For example, *Caban v. United States*, 671 F.2d 1230, 1233 (2nd Cir.1982) held that an immigration officer's judgment governed by standards requiring reference as to how an applicant "appears" and requiring that the official be properly "satisfied" of the proofs of entitlement, are not so broad as to compel immunization from suit under the discretionary function exception. *Ingham v. Eastern Airlines*, 373 F.2d 227, 233 (2nd Cir.), *cert denied*, 389 U.S. 931, 88 S.Ct. 295, 19 L.Ed.2d 292 (1967) held that the duty to report changing weather conditions when "necessary" was sufficient guidance to withstand challenge. *Accord, Wenninger v. United States*, 234 F.Supp. 499, 504 (D.Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir.1965). Moreover, there is nothing so unique in the type of injury at bar as to preclude application of traditional tort principles. *Allen v. United States*, 527 F.Supp. 476, 488 (D.Utah 1981).

Finally, the *Griffin* court noted that the judgments which Government scientists may permissibly make are circumscribed by applicable regulations; where decision-makers exceed that scope, liability may properly be imposed. 500 F.2d at 1068-69. *See also, United Scottish Ins. Co. v. United States*, 614 F.2d 188, 198 (9th Cir.1979) (the breach of "duty creating" regulations vitiates the Government's ability to assert the discretionary function exception).

Conclusion

The issues which we have addressed, the initial characterization of the suit as sounding in misrepresentation or negligence, the contours of the misrepresentation exception and the proper breadth of the Government's discretion are all "controlling issues" which admit to a "substantial ground for difference of opinion". 28 U.S.C. § 1292(b). Indeed, in deciding these issues we have considered numerous decisions which are admittedly not "fully reconcilable". *Green v. United States*, 629 F.2d at 585. Moreover, our conclusion to deny the Government's motion to dismiss subjects the Government to tremendous trial costs, a staggering amount of potential liability[11] and forces them to defend a suit in which they may ultimately prevail on jurisdictional issues. As such, we conclude that the "ultimate termination" of this litigation may well be "materially advanced" by an immediate appeal. *See, Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974), 28 U.S.C. § 1292(b).

Accordingly, we will certify this matter for an immediate interlocutory appeal and stay all proceedings in this Court pending the outcome thereof. *Id.* The question which we certify to the Third Circuit is no broader than that which has previously been certified for such an appeal, *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Inc.*, 478 F.Supp. 889, 946 (E.D.Pa. 1979), and is as follows:

> "Is our decision correct that neither the misrepresentation nor the discretionary function exception bars this suit?"

An appropriate order will issue.

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11 We recognize that the amount in controversy, coupled with the industry involved and the identity of the defendant invites a visceral reaction quite unlike that which normally permeates litigation. However, we have at all times sought to dispense true Plutonic justice; i.e., justice deriving from "reason unaffected by passion".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1017

GENERAL PUBLIC UTILITIES CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY,

vs.

UNITED STATES OF AMERICA,
Appellant.

(D.C. Civil No. 81-4950)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present:

WEIS, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the within cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST

/s/ SALLY MRVOS
Clerk

September 28, 1984

Provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801, et seq.

Section 206, 42 U.S.C. § 5846:

Compliance with safety regulations

Notification to Commission of noncompliance

(a) Any individual director, or responsible officer of a firm constructing, owning, operating or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended, or pursuant to this chapter, who obtains information reasonably indicating that such facility or activity or basic components supplied to such facility or activity—

(1) fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order or license of the Commission relating to substantial hazards, or

(2) contains a defect which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate,

shall immediately notify the Commission of such failure to comply, or of such defect, unless such person has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

Penalty for failure to notify

(b) Any person who knowingly and consciously fails to provide the notice required by subsection (a) of this section shall be subject to a civil penalty in an amount equal to the amount provided by section 2282 of this title.

Posting of requirements

(c) The requirements of this section shall be prominently posted on the premises of any facility licensed or otherwise

regulated pursuant to the Atomic Energy Act of 1954, as amended.

Inspection and Enforcement

(d) The Commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.

Section 208, 42 U.S.C. § 5848:

Abnormal occurrence reports

The Commission shall submit to the Congress each quarter a report listing for that period any abnormal occurrences at or associated with any facility which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended, or pursuant to this chapter. For the purposes of this section an abnormal occurrence is an unscheduled incident or event which the Commission determines is significant from the standpoint of public health or safety. Nothing in the preceding sentence shall limit the authority of a court to review the determination of the Commission. Each such report shall contain—

(1) the date and place of each occurence;

(2) the nature and probable consequence of each occurrence;

(3) the cause or causes of each; and

(4) any action taken to prevent reoccurrence;

the Commission shall also provide as wide dissemination to the public of the information specified in clauses (1) and (2) of this section as reasonably possible within fifteen days of its receiving information of each abnormal occurrence and shall provide as wide dissemination to the public as reasonably possible of the information specified in clauses (3) and (4) as soon as such information becomes available to it.

Excerpts From The Amended Complaint

FIRST CAUSE OF ACTION

NRC's Failure to Perform with Due Care its Undertaking to Discover, to Analyze and to Warn of Safety Hazards

20. Plaintiffs repeat and reallege paragraphs 1-19 as previously set forth.

21. The NRC had undertaken to discover, to analyze and to warn licensees of nuclear plants, including Met-Ed, of defects and hazardous conditions in plant components, systems, analyses, procedures and instructions. The NRC knew or should have known that plaintiffs would rely on the said undertaking, and plaintiffs did so rely. As set forth below, a proximate cause of the March 28, 1979 accident at TMI-2, its disastrous effects and the resulting damages to plaintiffs was the NRC's failure to perform this operational undertaking with due care.

22. As alleged in detail herein, the NRC negligently or wrongfully failed to warn licensees of other B&W-supplied nuclear plants, including Met Ed, of defects and hazardous conditions in plant components, systems, analyses, procedures and instructions of which the NRC, in the exercise of due care, should have known as a result of its investigation of a similar incident in September 1977 at the Davis-Besse nuclear plant of the Toledo Edison Company and as a result of other "precursors" of the TMI-2 accident. The NRC has admitted its negligent or wrongful failure, which is documented in a four-volume report that the NRC approved, published and released to the public in January 1980, entitled "Three Mile Island—A Report to the Commissioners and to the Public" (hereinafter, "*Special Inquiry*"). The NRC, in its *Special Inquiry*, admits that "The information concerning the incident that occurred at Davis-Besse was not effectively distributed to other B&W utilities, specifically to Metropolitan Edison," even though "[t]he incident that occurred at Davis-Besse is almost an exact copy of the accident that subsequently occurred at TMI."

(*Special Inquiry*, Vol. II, Part 1 at 155-56). The *Special Inquiry* also states that the NRC knew that "similar pieces of equipment [to that involved in the incident at Davis-Besse] with comparable probabilities of similar failure modes were installed on other B&W plants. . . ." (*Id.* at 156). Yet the NRC failed to warn the licensees of such plants, including Met-Ed, of the similar dangers. The NRC also admitted that "precursors" such as "the Michelson report [a study by an NRC consultant concerning, among other things, the response of B&W reactors during a small-break loss-of-coolant accident occurring at the top of the pressurizer] should have produced guidance that, *if it had been used*, would have prevented the extensive core damage that occurred at TMI." (*Special Inquiry*, *id.* at 138, emphasis in original). Had the NRC warned Met-Ed of the defects and hazardous conditions which, in the exercise of due care, should have been known to the NRC from its investigation of the Davis-Besse incident and from other precursors, Met-Ed would have used the information, instructions and guidance to prevent the extensive core damage that occurred at TMI-2.

The NRC Undertaking

23. The NRC has undertaken to render services to licensees of nuclear plants which, as the NRC has or should have recognized, are necessary for the protection of the property of owners, operators and licensees of nuclear plants, including plaintiffs. Specifically, the NRC in fact undertook to discover information from various sources, including operating experience at other nuclear plants, to analyze that information, and to warn licensees of defects and hazardous conditions in plant components, systems, analyses, procedures and instructions.

24. The NRC's undertaking to discover, to analyze and to warn licensees of defects and hazardous conditions was performed pursuant to statutory and regulatory requirements. In particular, Section 208 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5848, requires the NRC to disseminate information on any abnormal occurrence, including its causes

and any action taken to prevent reoccurrence, "as soon as such information becomes available to it." Likewise, 10 C.F.R. § 1.64 imposes a duty on the NRC to administer programs for "notifying licensees regarding generic problems so as to achieve appropriate precautionary or corrective action." These statutory and regulatory requirements were promulgated for the particular benefit of owners, operators and licensees of nuclear plants, as well as for the protection of the public health and safety. Thus, plaintiffs are members of the class which the statutory and regulatory requirements were designed to protect.

25. The Energy Reorganization Act requires the NRC to obtain, from any entity which constructs, owns, operates or supplies components to a nuclear facility, reports of (a) noncompliance with the Atomic Energy Act or any applicable rule, regulation, order, or license of the NRC relating to substantial safety hazards, in any component or analysis of a nuclear facility or (b) any defect which could create a substantial safety hazard, as defined by NRC regulations.

26. The NRC has in fact undertaken to disseminate among licensees of nuclear plants information derived from operating experience at all nuclear plants in the United States, including data on component failures and procedure changes, and has done so pursuant to mandatory regulations and agency operating procedures. 10 C.F.R. § 1.64 (1977); NRC Manual Ch. 0127 (1978); Inspection and Enforcement Manual Ch. 1110 (1977). Methods of dissemination include the issuance of Bulletins and Circulars to warn licensees of events or conditions of generic importance to safety. Inspection and Enforcement Manual Ch. 1125 (1978).

* * *

37. On September 26, 1977, the NRC commenced an investigation into the accident at Davis-Besse as required by its regulations. An NRC inspector from the Office of Inspection and Enforcement identified both the problem of operator response during the accident and the need for revised operator

training. The NRC inspector and six other members of the NRC staff, including senior engineers from the Office of Nuclear Reactor Regulation, attended meetings at Davis-Besse during the week following the accident.

38. Within two weeks of the September 24, 1977 accident, members of the NRC Office of Nuclear Reactor Regulation and the Office of Inspection and Enforcement met to discuss the NRC investigation of the accident. Subsequently the Office of Inspection and Enforcement, which had assumed primary responsibility for investigation of the accident, was directed to ascertain "the operator's role in participating in the event . . ." and to investigate "the operator's decision to secure HPI [high-pressure injection] flow based on pressurizer level indication . . . ." Internal NRC memorandum from Denwood F. Ross to Karl V. Seyfrit, October 20, 1977.

39. On October 21, 1977, the Assistant Director of the Division of Reactor Operations Inspection of the Office of Inspection and Enforcement requested that Toledo Edison explain in its Licensee Event Report why the operators terminated high-pressure injection during the September 24, 1977 accident. In fact, the Toledo Edison report did not relate the reasons for the termination of high-pressure injection by the operators, and the NRC negligently or wrongfully failed to report such reasons and related safety problems to licensees.

40. Following the September 1977 incident at Davis-Besse, the NRC failed to use due care in performing its undertaking to warn Met-Ed and other licensees of B&W-supplied nuclear plants of defects and hazardous conditions in certain components, systems, procedures and instructions which the NRC, in the exercise of due care, should have discovered and analyzed. These failures to use due care were inconsistent with duties previously assumed and undertaken by the NRC through past practice and regulations.

41. In addition, the NRC's negligence or wrongful conduct contravened duties imposed on the NRC by statute and regulations.

* * *

50. In September 1977, the NRC Reactor Systems Branch of the Division of Systems Safety, Office of Nuclear Reactor Regulation, received copies of a report prepared by Carlyle Michelson, a Tennessee Valley Authority engineer and a consultant to the NRC Advisory Committee on Reactor Safeguards ("ACRS"). The report, entitled "Decay Heat Removal Problems Associated with Recovery from a Very Small Break LOCA for a B&W 205—Fuel Assembly PWR," stated that, during certain small-break loss-of-coolant accidents, the pressurizer water level on B&W plants would give an erroneous indication of the amount of water in the reactor coolant system.

51. In January 1978, the Reactor Systems Branch acknowledged the concerns of the Michelson report in a memorandum expressing concern that a misleading indication from the pressurizer of the amount of water in the reactor coolant system during a loss-of-coolant accident caused by a small break at the top of the pressurizer would induce plant operators to turn off the high-pressure injection of replacement coolant. The Reactor Systems Branch specifically noted in the memorandum that such an incident had already occurred at Davis-Besse as a result of a stuck-open pilot-operated relief valve. The memorandum recognized that "operators would control makeup flow [*i.e.*, high-pressure injection] based on the pressurizer level as part of their normal procedures" and that as a result, "the operator could erroneously shut off makeup flow [high-pressure injection] when significant [steam] void occurs elsewhere in the system or loss of inventory [coolant] is continuing." The memorandum concluded that the NRC should review the proposed procedures of plants which were in the licensing process in order to ensure that plant operators would have adequate information before terminating the flow of high-pressure injection during such an incident. At that time, TMI-2 was in the NRC licensing process, prior to the issuance of its operating license.

52. In January 1978, Michelson provided the ACRS with a revised version of his report. The revised Michelson report

stated that plant operators, in reliance on the erroneous indication provided by the pressurizer water level of the amount of water in the reactor coolant system, would terminate the automatically activated high-pressure injection. The report also revealed that the loss-of-coolant accident which would cause such operator response had not been analyzed by B&W.

53. In the exercise of due care, the NRC should have known, as a result of the Michelson Report and the Reactor Systems Branch memorandum, that one potential consequence of the predicted termination of high-pressure injection was core uncovery and fuel damage.

54. After receiving the Michelson report, the NRC failed to use due care in performing its undertaking to warn Met-Ed and other licensees of B&W-supplied plants of generic defects and hazardous conditions in components, systems, analyses, procedures and instructions. These failures to use due care were inconsistent with duties previously assumed and undertaken by the NRC.

55. In addition, the NRC's negligence or wrongful conduct contravened duties imposed on the NRC by statute and regulations.

* * *

Reliance on Undertaking and Proximate Cause

64. The aforesaid failures of the NRC to exercise due care in the performance of its undertaking to discover, to analyze and to warn plaintiffs of defects and hazardous conditions were proximate causes of the accident at TMI-2 on March 28, 1979, its disastrous effects and the resulting damages to plaintiffs. Each of the acts or omissions set forth above was a substantial factor in bringing about the accident, its effects and the resulting damages.

65. Plaintiffs suffered harm to their property (a) because of plaintiffs' reliance upon the NRC's undertaking to discover, to analyze and to warn them of substantial safety hazards, and

(b) because the NRC's failure to use due care to perform said undertaking increased the risk of such harm.

66. Plaintiffs relied on the NRC to discover, to analyze and to issue warnings of defects and hazardous conditions in components, systems, analyses, procedures and instructions in accordance with the NRC's undertaking in fact and in accordance with the NRC's statutory and regulatory duties. Specifically, plaintiffs relied on the NRC to exercise due care to discover, to analyze and to warn them of substantial safety hazards based on operating experience at similar B&W-supplied plants and other sources. Met-Ed maintained a formal program for the review of communications from the Office of Inspection and Enforcement to determine promptly whether any adverse condition reported by the NRC required corrective action at TMI-2. Consequently, had the NRC performed with due care its undertaking to discover, to analyze and to warn Met-Ed of substantial safety hazards, Met-Ed would have taken prompt corrective action, thus avoiding the March 28, 1979 accident, its disastrous effects and the resulting damages to plaintiffs.

66A. Plaintiffs' knowledge of and reliance on the NRC's undertaking to discover, analyze and issue warnings of defects and hazardous conditions in components, systems, analyses, procedures and instructions induced them to forego certain other possible remedies or precautions against the risk of such defects and hazardous conditions.

66B. In light of the potentially devastating hazards of nuclear power recognized by Congress, the NRC's undertaking was central to the existence of the nuclear industry. Electric utilities would not have chosen nuclear power over fossil fuels, and would not have continued to operate nuclear plants, without the assurances of safety provided by the NRC's warning system or some alternative private system. Had the NRC ceased operating its system, nuclear plant operators, including plaintiffs, would have had to cease or drastically cut back their operations or devise an alternative warning system.

66C. Since it would have been totally unrealistic for each plant to dispatch a team of investigators every time an unusual occurrence with potentially generic significance took place at another plant, the only realistic alternative to the NRC's warning system would have been a private central organization to monitor nuclear operating experience nationwide and to warn nuclear plant operators of generic safety hazards. As long as the NRC's warning system was in operation and it was believed that the NRC was performing its undertaking with due care, such a private organization would have been duplicative and unnecessary. However, since the accident at TMI-2 and the disclosure of the NRC's failure to exercise due care in the performance of its undertaking in connection with the September 24, 1977 event at Davis-Besse, the owners and operators of nuclear plants, including plaintiffs, have in fact formed the Institute of Nuclear Power Operations (INPO) which, among other things, now monitors nuclear operating experience industrywide and warns the owners and operators of nuclear plants of defects and hazards discovered at other plants. Plaintiffs' knowledge of and reliance on the NRC's undertaking to discover, analyze and issue warnings of generic safety hazards and defects induced them to forego the possibility of joining with other owners and operators of nuclear plants prior to March 28, 1979 to form such a private central organization.

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No. 84-790

In the Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL PUBLIC UTILITIES CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a suit against the United States brought by the owners and operator of a nuclear power plant, alleging that the Nuclear Regulatory Commission negligently failed to provide them with sufficient information concerning a safety-related incident at another privately owned and operated nuclear installation, is barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 745 F.2d 239. The memorandum opinion of the district court (Pet. App. 18a-35a) is reported at 551 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a) was entered on September 28, 1984. The petition for a writ of certiorari was filed on November 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the owners and operator of the Three Mile Island Unit No. 2 nuclear generating plant (TMI), brought this action against the United States under the Federal Tort

Claims Act (28 U.S.C. 2671 *et seq.*), seeking more than $4 billion in damages resulting from the March 28, 1979 accident at TMI. The United States moved to dismiss the complaint on the ground, inter alia, that the suit is barred by the discretionary function exception to the Act's waiver of sovereign immunity (28 U.S.C. 2680(a)). The United States District Court for the Eastern District of Pennsylvania denied the motion (Pet. App. 18a-35a) and certified the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals reversed (Pet. App. 1a-17a).

1. The accident at TMI occurred when a valve failed to close properly, resulting in a significant loss of water and steam in the reactor's coolant system. Because a faulty instrument showed that the valve was closed and control-room personnel did not perceive the loss of coolant, the operators reduced the flow of replacement water, causing the nuclear core to overheat and radioactive material to be released. Pet. App. 3a, 18a-20a. Petitioners seek damages primarily for loss of plant property and economic losses occasioned by the interruption of power generation at the plant (C.A. App. 111-113).

Petitioners allege that the accident was caused by the failure of the Nuclear Regulatory Commission to report to them as an "abnormal occurrence" or a "generic problem" a similar valve failure that occurred at the Davis-Besse nuclear power plant in 1977 (Pet. App. 11a). An abnormal occurrence is defined as "an unscheduled incident or event which the Commission determines is significant from the standpoint of public health or safety" (42 U.S.C. 5848). Section 5848 specifies that abnormal occurrences be reported to Congress and that the Commission "provide as wide dissemination to the public of the information * * * as reasonably possible." The term "generic problem" is not used in the Act. The Commission's regulations state that its "Office of Inspection and Enforcement develops policies

and administers programs for * * * notifying licensees regarding generic problems so as to achieve appropriate precautionary or corrective action." 10 C.F.R. 1.64.

It is undisputed that the Commission sent to petitioners a Licensee Event Report describing the Davis-Besse incident (Pet. App. 5a & n.3). Petitioners' claim is based on their allegation that the Commission should have characterized that incident as an abnormal occurrence or generic problem and therefore reported more detailed information and an evaluation of what had occurred. *Id.* at 11a; see C.A. App. 90-91 (allegation in petitioners' complaint that Commission violated 42 U.S.C. 5848).[1] Had they received this information, petitioners contend, they would have corrected the valve condition and control-room procedures at TMI and thus prevented the March 1979 accident (Pet. 7; Pet. App. 40a).

2. While the appeal was pending, this Court decided *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984). In *Varig Airlines,* the Court held that claims alleging that plane crashes were caused by the Federal Aviation Administration's negligent performance of its aircraft inspection and certification functions were barred by the discretionary function exception. Relying on *Varig Airlines* and *Dalehite* v. *United States,* 346 U.S. 15 (1953), the court of appeals rejected petitioners' contention that their claim is not within the discretionary function exception (Pet. App. 11a-14a).

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[1]Petitioners do not seek review of the court of appeals' ruling that their claim alleging that the NRC failed to exercise due care in licensing the TMI facility is within the discretionary function exception (Pet. 5-6 n.4; see Pet. App. 14a-16a). Nor, apparently, do they challenge the court of appeals' similar disposition of their claim that the Commission failed to conduct an adequate investigation of the Davis-Besse incident (see *id.* at 8a, 10a-11a).

The court of appeals reasoned that the determination of whether an "abnormal occurrence" had occurred is "entrusted to the discretion of the Commission" (Pet. App. 12a). As the court noted, such a determination "is not a mere ministerial task" but rather requires "[t]echnical and scientific evaluations" and "considerations of public health and safety" (*id.* at 12a-13a). The classification of this decision as a discretionary function, the court reasoned, followed directly from *Varig Airlines* and *Dalehite* (Pet. App. 13a):

> There is no substantial distinction between the choice made by the FAA as to its method of inspection and decisions made by the Nuclear Regulatory Commission to classify certain incidents as statutory "abnormal occurrences." If anything, the discretion entrusted to the Commission would seem to be greater than that given the FAA.
>
> * * * * *
>
> [T]he government's specifications of bag labels and bills of lading in *Dalehite, see* [346 U.S.] at 39, implicate far less of a policy determination than the classification of a nuclear event as an abnormal occurrence.

A similar analysis applied to the determination of whether an incident represents a "generic problem" (Pet. App. 14a). The court concluded that, like reports of abnormal occurrences, "[t]he program for notifying licensees of generic problems is but one part of the overall discretionary function the Commission undertakes when it monitors the safety of the nuclear industry" (*ibid.*).

ARGUMENT

The court of appeals correctly applied this Court's precedents interpreting the discretionary function exception to the facts of this case. "[D]iscretionary acts of the Government acting in its role as a regulator of the conduct of

private individuals" are at the core of the exception (*Varig Airlines,* slip op. 15 (footnote omitted)). The Nuclear Regulatory Commission, in deciding the proper classification of an event at a nuclear generating plant, is plainly making a discretionary determination in the course of its regulatory function.

Petitioners argue primarily (Pet. 8-13) that the Commission's decision not to classify the Davis-Besse incident as an abnormal occurrence or generic problem implicated "[n]o social, economic or political judgments" (Pet. 11) and so does not come within the discretionary function exception.[2] The court of appeals, however, correctly determined that the Commission's decision was not "ministerial" but rather required "[t]echnical and scientific evaluations" and "considerations of public health and safety" (Pet. App. 12a-13a).

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[2]Contrary to petitioners' apparent contention (Pet. 7-8), failure-to-warn cases are not excluded from the coverage of the discretionary function exception. There is of course no basis in the statutory language for such an exclusion. Where discretion is involved in determining whether any warning is called for or the type of warning to be made, the discretionary function exception applies. See, *e.g., Dalehite* v. *United States,* 346 U.S. at 41-42 (decisions with respect to contents of labelling of potentially explosive fertilizer are within the exception). Indeed, in *Varig Airlines,* the FAA, by certifying the defective aircraft, had failed to warn of their dangerous condition.

Petitioners also are incorrect in arguing (*e.g.,* Pet. 12) that *Varig Airlines* is inapplicable because here the agency failed to provide information known to it while in *Varig Airlines* the defects were never discovered. Petitioners simply miss the discretionary function at issue in this case: determining whether the Davis-Besse incident constituted an "abnormal occurrence" or "generic problem," which would have resulted in a more complete report by the Commission than the warning it actually gave. In effect, petitioners would have the courts second-guess Congress's and the Commission's decision to require reports only of serious events and not of every last datum in the agency's files. The discretionary function exception is designed precisely to prevent such judicial intervention (*Varig Airlines,* slip op. 16, 22). Moreover, the exception applies "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). Accordingly, whether the Commission was negligent or otherwise acted wrongfully is irrelevant. See *Dalehite* v. *United States,* 346 U.S. at 33.

The statute requiring reports of abnormal occurrences conclusively demonstrates that the determination of whether such an event has occurred is entrusted to the discretion of the Commission: "an abnormal occurrence is an unscheduled incident or event *which the Commission determines is significant from the standpoint of public health or safety.*" 42 U.S.C. 5848 (emphasis added); see 42 Fed. Reg. 10950 (1977) (guidelines for classification of incident as an abnormal occurrence). It is frivolous to suggest that such a determination (or the similar inquiry with respect to the existence of a "generic problem") does not implicate the agency's discretion or that Congress intended to subject the Commission's determination to judicial review in the guise of adjudicating tort claims.[3]

Nor is there merit to petitioners' argument (Pet. 13-15) that the Commission, in monitoring the safety of nuclear power plants, is not acting in its regulatory capacity.[4] The

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[3]The Court made it plain in *Varig Airlines* that *all* discretionary activities, not just those of high-level policy-making officials, are within the exception. See slip op. 15 ("the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability"); *id.* at 22 (implementation of inspection program by FAA employees within exception). See also *Flammia* v. *United States*, 739 F.2d 202, 204 (5th Cir. 1984) (under *Varig Airlines*, the exception "extends to specific individual applications as well as to broad policies"). The Court has already vacated and remanded for reconsideration in light of *Varig Airlines* a decision refusing to apply the exception to "conduct consist-[ing] of merely implementing and enforcing mandatory regulations." *Hylin* v. *United States*, 715 F.2d 1206, 1213 (7th Cir. 1983), vacated, No. 83-1818 (Oct. 1, 1984).

[4]The Commission regulates entities, such as petitioners, that own and operate nuclear generating facilities. See 42 U.S.C. 2011 *et seq.*, 5801 *et seq.* (The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred "all [of its] licensing and related regulatory functions" to the NRC. 42 U.S.C. 5841(f); see 42 U.S.C. 5814(a).) The Commission is given the responsibility for "[r]eview[ing]

Commission does not itself generate nuclear power. Compare *McMichael* v. *United States,* No. 83-2497 (8th Cir. Jan. 2, 1985), slip op. 7 (distinguishing between regulatory and proprietary conduct for purposes of discretionary function exception).[5] In monitoring nuclear facilities and reporting safety-related information, the Commission is not performing a service for the benefit of the owners and operators of nuclear plants but rather is carrying out its regulatory mission — controlling private conduct involving "the possession, use, and production of atomic energy * * * so directed as to make the maximum contribution to * * *

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the safety and safeguards of all [commercial nuclear] facilities, materials, and activities" (42 U.S.C. 5843(b)(2)). It is unlawful to operate a commercial nuclear power plant without a license from the Commission (42 U.S.C. 2131). The Commission is authorized to require from owners and operators "such reports, and the keeping of such records * * * as may be necessary to effectuate the purposes of" the Act (42 U.S.C. 2201(*o*)). Licensees (and others) must immediately report to the Commission any failure to comply with statutory and regulatory requirements and any "defect which could create a substantial safety hazard" as defined by the Commission (42 U.S.C. 5846(a)(2)). The statute authorizes the Commission "to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with" the reporting obligation (42 U.S.C. 5846(d)).

[5]This case is therefore unlike the malfunction of the lighthouse in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), and the erroneous air-traffic information given in the cases relied on by petitioners (Pet. 7), because there the United States had assumed direct, operational responsibility for the activity that caused the injury. See *Zabala Clemente* v. *United States,* 567 F.2d 1140, 1147-1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). Moreover, as the Court explained in *Varig Airlines* (slip op. 14), "the discretionary function exception was not implicated in *Indian Towing*" because the government had conceded the point. The only post-*Varig* case relied on by petitioners, *Andrulonis* v. *United States,* 593 F. Supp. 1336 (N.D.N.Y. 1984), is an interlocutory ruling involving the development of a method for immunizing wildlife against rabies. The court distinguished the decision below on the ground that it involved the exercise of regulatory authority (593 F. Supp. at 1338).

the national welfare" (42 U.S.C. 2013(c)).[6] The Commission's monitoring and reporting functions are an important part of its regulation of the conduct of licensees and enforcement of its rules. See, *e.g.*, 10 C.F.R. 1.64 (notification of generic problems is for purpose of "achiev[ing] appropriate precautionary or corrective action"). The responsibility for the safe generation of nuclear power remains squarely on the shoulders of the owners and operators of the power plants, not on the regulatory agency. Cf. *Varig Airlines,* slip op. 22 ("[t]he FAA has a statutory duty to *promote* safety in air transportation, not to insure it") (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

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[6]Accordingly, the fact that petitioners have established for their own benefit a private "warning system * * * to provide the owners and operators of nuclear plants with warnings of serious safety hazards" (Pet. 14) is wholly irrelevant to whether the Commission's safety-related functions are part of its regulatory activities. Petitioners would stand the regulatory scheme on its head: the Commission was created to control its licensees, not to serve them. If the NRC acted improperly, it breached its governmental responsibilities to the general public, not a duty of care to petitioners. The remedy is through administrative or legislative action, not through judicial review in the context of tort litigation brought by private plaintiffs.